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ABSTRACT

Third-party intervention is increasingly recognized as an effective means of settling social, institutional, community, and interpersonal disputes. Traditionally, mediation efforts have been directed toward conflicts involving labor/management relations. Since the 1960s, however, mediation efforts have also been applied to situations involving social disputes, environmental disputes, racial protests, and criminal and civil offense cases. Examples of mediation efforts which have been assisted since 1968 by the Ford Foundation include a racial/public disorder early warning system in Florida; housing disputes in New York, San Francisco, and Cleveland; demands of Puerto Rican activists for a day care center; Indian occupation of parkland in upstate New York; school desegregation in Boston; confrontations at various colleges and universities; and a struggle between black and Puerto Rican communities in New York for control of an antipoverty program. Programs to train people in conflict resolution techniques are sponsored by numerous groups including the American Arbitration Association, the Justice Resource Institute, and better business bureaus. (DB)

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Mediating Social Conflict

A FORD FOUNDATION REPORT

Contents

Community Disputes	7
Dispute Resolution in Institutions	15
Court Diversion Programs	19
Environmental Disputes	21
Training	28
Prospects	30

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October 1978.

—Near Seattle, Washington, a twelve-year dispute over the construction of a dam has reached an impasse. Farmers, conservationists, land developers, the Army Corps of Engineers, and state and local government officials are involved. "There should be a way to settle this," one of the protagonists writes to the governor. "If only there was a way for us to start talking to each other."

—At the California youth prison in Stockton, a 21-year-old inmate grows a beard. The director orders him to shave it off. The inmates threaten to strike. In the dormitories and dining room, there is talk of "another Attica."

—At newly integrated Hyde Park High School in Boston, the first day of classes finds black and white students squared off against each other. On the steps to the school, a student tells the assistant principal, "Unless we cool things down, somebody's going to get hurt."

—In upstate New York, American Indians occupy state park land. Nearby residents drive past the occupied site with shotguns sticking out of their car windows. Two persons have been shot and seriously wounded. The state police have been called in to restore order, but the commanding officer is pessimistic. A show of force will only exacerbate the conflict. He says, "This showdown between the two cultures is becoming more violent with each passing day."

—In East Harlem, New York, a 35-year-old woman is having serious problems with her mother-in-law, who accuses her of being a bad mother and wife. Her husband threatens to leave the household, taking the children with him. Her oldest son has thrown a punch at the mother-in-law. "I'm afraid this is going to break up my marriage," the woman says. "I need help."

In each of these conflicts the disputants recognized that they needed the assistance of a third party to resolve their differences. The process of third-party intervention, known variously as mediation, arbitration, conciliation, and facilitation, has grown in the last decade as a preferred alternative to sustained confrontation and protracted litigation.*

This report is concerned with the development of third-party intervention as an effective instrument for settling social, institutional, community and interpersonal disputes. The illustrations are taken from efforts in this direction which have been assisted over the past several years by the Ford Foundation. More recently the Foundation has given support to experiments in applying mediating processes to situations in which they had not been commonly used before, such as environmental disputes and certain criminal and civil offense cases.

A FEW EFFORTS in social mediation were already underway in 1968 when the Foundation made its first major grant in this field. The state of Florida had established an early-warning system to alert state and local officials to racial disputes before they erupted into violence and to mediate disputes before they touched off public disorders. The federal Community Relations Service, established under the 1964 Civil Rights Act, had organized local advisory panels of citizens in some forty localities to alert the agency to potentially serious disputes and to intervene in conflicts involving public housing, economic development, education, and police conduct. Both the Community Relations Service and the Florida program were conceived of as basically preventive measures. Both had proven effective in reducing tension.

The largest and most experienced nongovernmental mediation service in the United States is the American Arbitration Association (AAA). A nonprofit organization founded in 1926, AAA operates through twenty-three regional offices, which have enlisted the services of more than 40,000 arbitrators and mediators in labor-management and commercial disputes. As a natural vehicle for a community conflict resolution program, the AAA in 1968 established a National Center for Dispute Settlement, now known as Community Dispute Services (CDS), with a grant from the Foundation. Grants by 1978 totaled $2.8 million, and the center is becoming increasingly self-supporting through revenue earned by its training and mediation services.

*Third-party intervention is used here as an inclusive term, encompassing mediation, arbitration, facilitation, independent fact-finding, conciliation and other forms of conflict resolution.

Donald B. Straus, president of AAA at the time the center was established, recognized that it would be difficult to restructure traditional techniques of mediation and arbitration used in reducing industrial conflict to make them useful in social disputes.

"In business," Straus says, "you start with a contractual relationship. That sets the boundaries; it tells you roughly how far you can go in a settlement. With social disputes, there's usually no contractual relationship between the parties. You're starting without guidelines. In business you know who the parties in the dispute are and what the basic issues are. Often that's unclear in community conflicts. Part of the mediator's job is to find out who are the real disputants and bring them to the table. In a lot of community fights, you have to dig out the real issues, which are buried underneath the public positions. The issues often change during the negotiations as new interests develop. Perhaps the hardest problem is that you're not dealing with a battery of high-powered lawyers and negotiators; you're dealing with activists who are not coldly logical. The mediator must let them vent their emotions, their anger, their stored-up feelings, before he can get at the issues."

Moreover, the issue of whether an agreement supported by all of the parties can be implemented rarely occurs in traditional commercial negotiations. But in social conflicts it is a matter of no small significance whether funds can be found to build an agreed upon dam or whether prison officials will honor commitments made during arbitration. What mediators call the "reality factor"—whether an agreement can survive the tugs and strains of political, economic, and social interests—is something the mediator has to consider.

To support research into negotiations conducted in the settlement of racial disputes, the Foundation has also provided $167,700 to the Institute of Labor and Industrial Relations, jointly administered by the University of Michigan and Wayne State University in Detroit.

The Foundation also sought to determine the impact of a concentrated effort at social mediation in a single city. New York City, with a surfeit of disputes in communities, schools, housing projects, and antipoverty agencies, was one evident choice. In New York, the Institute for Mediation and Conflict Resolution, founded in 1970, now provides a nongovernmental service to mediate social disputes and to train lay citizens, community leaders, and public officials in the principles of dispute intervention. The Foundation has supported the institute with grants totaling $1,520,000. By 1980, the institute is expected to be

supported primarily by funds from the city government, though it will not become a city agency. According to former Deputy Mayor John E. Zucotti, "A broad base of support that does not depend on any single funder would seem to best preserve the institute's independence of action."

Conflicts involving preservation of the natural environment, provision of such public services as highways and mass transit, and economic development have proliferated in the 1970s, and the Foundation has responded by providing support for a number of environmental dispute resolution programs. The Foundation provided funds in 1973 for an Environmental Mediation Project at Washington University in St. Louis, an offshoot of the Community Crisis Intervention Center. Since 1975, the Foundation has joined with the Rockefeller Foundation to provide grants totaling $353,500 to the Institute for Environmental Studies at the University of Washington in Seattle.

The Institute of Behavioral Science at the University of Colorado, which is developing a system to prevent potential conflicts from reaching the crisis stage, has received separate two-year grants of $30,000 from both the Ford and Rockefeller Foundations. Funding has also been provided for a number of organizations that are studying energy and environmental policy issues. Among them is the New England Energy Policy Council, an organization of private citizens, corporation executives, and academics who are studying and attempting to reach a consensus on such issues as air pollution control policy, oil drilling on the outer continental shelf, and the conversion of oil-burning power plants to the use of coal.

Since 1970, the Ford Foundation has also provided more than $12 million in grants to public interest law firms and organizations engaged in improving the quality of justice in the United States.* While most of these firms and organizations have been primarily concerned with advocacy rather than mediation, a number have shown increasing interest in the conflict resolution process.

The growing use of mediation to resolve social conflicts signals a changing attitude toward compromise among social activists, community representatives, and institutional officials. Compromise, or to use the gentler term, "accommodation," is no longer reflexively regarded as ethically unsavory. Among the reasons that compromise is now more

*See *The Public Interest Law Firm: New Voices for New Constituencies* and *Public Interest Law: Five Years Later*, available on request from the Foundation's Office of Reports.

feasible is that power is better distributed, which in turn is the result of the work of civil-rights organizations, public interest law firms, and consumer and environmental groups.

Community Disputes

When the principles of labor-management negotiations were first being applied successfully to community disputes, accounts of what had actually taken place were rather casual and sketchy. Mediators were likely to refer to "good timing" as the secret of success. Often the resolution of conflicts seemed to hinge mainly on the personal styles of the mediators. Neutrals were often reluctant to reveal what had occurred at the bargaining table because they were concerned that disclosure of what disputants said and did might jeopardize a carefully wrought settlement.

But after ten years and hundreds of mediated disputes, there is now sufficient precedent and experience to analyze the process. The rudiments of mediation and arbitration can be examined in milestones of conflict resolutions such as housing disputes in New York, San Francisco and Cleveland; the demands of the Young Lords, a group of Puerto Rican activists, for a day care center; the Indian occupation of parkland in upstate New York; school desegregation conflicts in Rochester, New York, and in Boston; confrontations at various colleges and universities, ranging from Columbia to the University of Kansas; and the struggle between Brooklyn residents and the city administration over the scheduled closing of a firehouse.

One of the most important lessons learned from these and other mediation experiences is that some disputes cannot be settled. Failure is inevitable if the dispute merely involves personal acrimony or a struggle for leadership, with no really substantive issues to be considered. The risk of failure also is high if the disputants do not know what their goals are, or if community groups involved in a dispute do not represent the majorities of their constituencies. Sometimes, mediation is meant to fail. As George Nicolau, vice president and executive director of the Institute for Mediation and Conflict Resolution in New York, has said, the real reason mediators are sometimes asked to intervene in a dispute is to ratify an inevitable defeat of one of the parties. Hasty entry into mediation may also court failure. Frequently it is necessary to spend months on pre-entry assessment, fact-gathering, and "sounding out"

before a situation is ripe for mediation. However, in many crisis situations, the luxury of long and careful study is not available. There is irresistible pressure for swift resolution and the mediator is forced to move too quickly into a volatile conflict. Also, mediation is sometimes instigated not to settle a dispute but to paper over an unstated conflict or to relieve leaders or elected officials of the responsibility of making difficult or unpopular decisions. "To intervene before they have a chance to do that could be premature," says Hubert Irons, a black community leader who was involved in the successful mediation of a tense dispute in his neighborhood, Morrisania, in the Bronx, New York. "We have to be aware that a lot of times so-called leaders would prefer to have somebody come in and settle a dispute than face their own problems squarely. Mediation can be a palliative, a narcotic that we have to be careful of. It should be employed when there's no way out."

The Lessons from Morrisania. In Morrisania, black and Puerto Rican communities were struggling for control of an antipoverty program. The dispute began in 1969 with the first elections for the board of the community's antipoverty corporation. The results were surprising. Although the population in the area was more than 60 per cent black, two-thirds of those elected to the board were Hispanics. Black leaders demanded a new election. The Hispanic leadership maintained that it had done a better job of organizing its supporters, and that the election results should stand. The conflict was intensified by a running battle between the director, a black, and the Hispanic majority on the board. The board demanded his dismissal, charging that he was hiring staff members without their approval. The director accused the Hispanic majority of discriminating against blacks in the poverty program.

A $3 million-a-year program was thrown into confusion. Banks refused to honor checks because it was not clear who had the authority to sign them. The impasse prevented the hiring or firing of staff. With the dispute at the boiling point, the deputy mayor and the city's Community Development Agency asked the Institute for Mediation and Conflict Resolution to intervene.

"No single mediator acceptable to both sides could be found," recalls Basil Paterson, then director of the institute, now a deputy mayor of New York. "We came up with a list of names, and the parties picked one for each side. Then we proposed a third mediator, Carl Rachlin, a law professor at Hunter College." The other mediators selected were

Bernard Jackson, assistant to the commissioner of the National Football League and former head of the Bronx NAACP, and Arnaldo Segarro, special assistant to then Mayor John Lindsay.

Each of the Morrisania mediators used his racial and ethnic identification to move the parties toward settlement. "It was really a revelation to me," says Irons, who was then a board member and is now chairman of the agency. "When one of the people on the black side would say something that was totally unacceptable to the other side, the black mediator would say to us, 'Now, after all, that's ridiculous, they can't get support in the community for that.' He would chastise us, slightly, and coming from him he could get away with it. The Puerto Rican mediator would do the same thing."

It was difficult, furthermore, to distinguish between the mediator's real temperament and his "stage" presence. In the Morrisania dispute, the black and Puerto Rican mediators maintained an understated nonargumentative posture while the Hunter professor, whom neither side considered sympathetic, assumed a more aggressive, sometimes impatient attitude. As Irons recalls, Rachlin could be be biting and abrasive when the disputants refused to budge from their positions. "He was the point man," Irons says. "The black and Hispanic mediators came across as moderate and understanding. The white mediator would get tough with both sides, and he took the heat."

Outside formal negotiating sessions, the mediators also worked with individuals from both sides who seemed to have potential for leadership. In Irons, for example, they recognized a voice of moderation and reason. "I would tell Irons before the meetings what I was trying to do," Jackson, the black mediator, recalls. "If someone else in the black caucus tried to undermine what I was doing, Irons would understand that and deal with it. He knew my bottom line. These internal weavings were vital to the whole mediation. There were things I could say to him that I couldn't say to the other black members of the board. I let him know that whatever decision we reached it couldn't be all black or all Hispanic."

Irons exerted his leadership when the discussions bogged down on the issue of whether to dismiss the director of the antipoverty agency. "Everybody was worried about losing face," Irons says. "I realized that I had to act for the entire community, not for myself or for the director, or for the other members of the caucus."

Irons finally prevailed on the black caucus to agree to a plan to dismiss the director but pay him for the balance of his contract. In return the

Hispanic board members agreed to name blacks to key committee posts in the agency and to permit the black caucus to name a new director. After more than two months of tense negotiations, acrimony, accusations, threats of violence, and apparent stalemate, the mediation was over.

The Morrisania settlement contained many of the elements basic to successful conflict resolution. The mediators allowed the disputants a certain amount of bombast but persuaded them to observe the procedures of peacemaking; they nurtured previously unrecognized leadership; they were always aware of political considerations, and they counter-balanced the rhetoric of the disputants with a realistic appraisal of the issues and the problems.

The Mohawk Case. "You have to know the political implications. It's fifty percent of the game. The worst thing is a naive mediator," says Howard Rowley, who intervened in the Mohawk Indian dispute in upper New York State as a representative of the AAA's Community Dispute Services. Rowley had been asked in December, 1974, to step into the conflict over Indian occupation of park land near the town of Big Moose, fifty-five miles northeast of Utica, New York. The occupation, he says, was intended largely as a symbolic act to establish the Indians' claim to 8 million acres of New York State land which they contended had been illegally taken from them in the eighteenth century.

Joseph B. Stulberg, now national director of CDS and head of the Rochester regional office when the dispute developed, assisted Rowley. "Originally, it looked like a dispute between the Indians and the residents, but once you got into it, it wasn't that simple," Stulberg notes. "The state was a party, but *who* in the state should we be dealing with? If you're talking about tension it would be the state police. If it's about park land, it's the department of environmental conservation; if the question is who owns the land, maybe it's the governor's office.

"Also," Rowley adds, "the real power was the federal government. The Department of Interior had to be brought into the process. As to the Indians, could you deal only with the Mohawks, or do you bring in representatives of the Six Nations?"

Rowley's own political sophistication is widely developed. He began his working life as a boilermaker and later rose to an executive position with a Rochester utility company. He had worked with the city of Rochester in successful efforts to end street gang violence. "I used

everything I could to get my foot in," he says. "To the conservative residents of the area, I emphasized my position with the company. And to the government officials and police, I talked about my work with the gangs in Rochester. In this kind of thing you can't be modest."

Rowley began by meeting separately with the Indians, local residents, and the state police. "I emphasized that dispute resolution was a totally voluntary process. We could withdraw any time they wanted us to. After a few meetings they were getting the idea that neither side was going to kill the other."

More than a year of shuttle diplomacy ensued, with Rowley traveling between Washington, Albany, and Big Moose, with many other stops enroute, before he could shape an eviction settlement. "I could have gotten a settlement ten months earlier," he recalls now, "but I never made a move unless it was completely wired, unless I had approval on all levels. I purposely tried to steer away from the question of Indian rights because that had to be resolved by government and the courts. My purpose was to reduce tensions and permit the Indians to withdraw from the occupied land without conceding their basic claim to the land."

In return for the Indian withdrawal from the Big Moose tract, the state agreed to lease or provide to the Indians 900 acres of state park land near Altona, New York. The state also agreed to issue a permit enabling the Indians to occupy 9,000 acres of state forest land in Clinton County in upstate New York. This land had been previously used as a camp site by nonprofit organizations.

The basic dispute that led to the Big Moose occupation—the Indians' claim to 8 million acres—is still under mediation. "Indians have strong cultural and tribal resistance to dealing directly with government," Rowley says. "But they know nonetheless that they have to communicate with the state or county or the sheriff's department. The mediator can act as an intermediary, a middle-man between tribal government and the state and federal governments." Major Robert Charland of the State Police, who describes himself as a veteran police administrator whose attitude has been cynicism towards any and all 'do-gooders' and most social agencies, agrees. He believes that "this solution will probably be the foundation for resolving Native American Indian problems throughout all of the United States."

When Courts Bow Out. Successful settlement of a social conflict requires not only that the mediator be impartial but that he or she also be

Seward Park housing project on New York City's lower East Side was the focus of a controversy between Puerto Ricans and Orthodox Jews that was mediated by the Institute for Mediation and Conflict Resolution (see pages 11 to 15). Building at center is a synagogue, behind which are towers of the Grand Street Guild, a housing corporation of St. Mary's Church, which cooperated in the settlement by providing additional apartments for both contending groups.

seen as such by the disputants. The role—and role-playing—of the mediator can be vital to successful mediation. Skilful mediation can not only help bring about acceptable compromise of conflict, it can also help shape the nature of the compromise. Mediators play down certain issues and focus attention on others. Their sponsorship by high-ranking public officials can be used to increase pressure for a settlement. At the request of mediators public officials on occasion have set deadlines, intensifying pressure for agreement. The role of the mediator in the settlement of a conflict over public housing on New York's Lower East Side is a case in point.

The issue in this case was racial integration of the newly built Seward Park low-income housing development versus priority occupancy for former residents of the site. (Local housing authorities frequently face this issue when public housing is built in changing neighborhoods.)

The New York City Housing Authority had decided to lease some apartments in the unfinished 360-unit development to residents of the area surrounding the site. Most of these residents were elderly orthodox Jews. The decision apparently contravened the authority's policy of giving top priority to former-site occupants, most of whom were Hispanics. The Puerto Rican neighborhood coalition sued the Housing Authority, along with the Federal Department of Housing and Urban Development. For more than two years the issue was contested in the courts. All the while, the apartments remained vacant.

Both sides recognized that it would be difficult for the courts to resolve the central issue—the racial and ethnic balance of the new housing complex and the Seward Park community—and the courts themselves had no appetite for a definitive ruling. Puerto Rican leaders feared that many of the residents would leave the area before the dispute was finally settled. The representatives of the Jewish community were concerned about the safety of their elderly constituents, not to mention their life expectancy. "We were concerned that many of the elderly would have died before this was resolved in the courts," says Kalman Finkel, the Legal Aid attorney who intervened on behalf of the Jewish residents. There was also a concern about crime and violence in the area surrounding the development. Getting into the project, they felt, was a matter of protecting their lives. Also, Finkel points out, "No politician in this city wanted to touch the dispute. However it was settled, a politician figured he had to lose something in a fight between Puerto Ricans and Jews."

George Nicolau of the Institute of Mediation and Conflict Resolution was approached to intervene in the dispute. To achieve a settlement, Nicolau had to meet three challenges: to win the trust of both sides, to dissipate the anger and focus the disputants on the real issues, and to devise a settlement that would provide public-housing apartments to both sides in sufficient number to satisfy the disputants.

Both sides were wary and on the lookout for any signs of favoritism by the mediator. Having been director of the antipoverty program in New York, Nicolau knew the attorney who represented the Hispanic coalition, but was not familiar with the other side; this created suspicion which Nicolau had to overcome by open-handed dealing with both sides.

For three months Nicolau met separately with the two groups, hoping to prepare each to understand the intricacies of the situation. "I wanted them to start thinking about hard realities, not the ideal solution," he says.

When he judged the time was right, Nicolau told one group he thought the other side was prepared to make an offer. However, he advised them not to accept or reject the offer immediately but to ask questions and get complete details of what the other side was offering. Discussion led to clarification of the situation. "They found out they were talking about a lot less people than they had thought," Nicolau recalls. "Some people had left the neighborhood. In some cases the number of rooms in the available apartments didn't meet their needs. Some of the people wanted only ground-floor apartments. For the first time we had a realistic sense of what was involved."

Finkel believes that Nicolau's approach helped dissolve tension: "We started talking numbers, not principles. He made the representatives of each group responsible for talking reason and facts to their constituents."

Nicolau's familiarity with the political structure and government bureaucracy in New York and his association with community leaders and religious and racial spokesmen were vital factors in his mediation efforts. He skillfully involved the power brokers in the settlement, thus securing the resources that made an agreement possible.

When he had an accurate estimate of the number of people from both groups seeking apartments in the Seward Park project, he entered into discussions with the Grand Street Guild, a housing corporation of St. Mary's Church, which was then constructing a housing development

alongside Seward Park. The Roman Catholic Archdiocese of New York agreed to provide 160 still unrented low-income apartments in this development to both Hispanics and orthodox Jews who had wanted to rent apartments in the Seward Park project. Nicolau then negotiated an agreement with the city housing authority to make apartments available in other desirable city projects to families who could not be accommodated in either the Guild or the Seward Park project. With tensions lowered and the parties indicating a willingness to consider some form of compromise, Nicolau was able to announce additional units were now available, and an agreement followed relatively quickly.

The resolution did not end Nicolau's involvement. District Court Judge Morris E. Lasker in February, 1974, five months after mediation began, asked Nicolau and a housing authority official to monitor the renting of the Seward Park apartments so that the agreed-upon formula of 60 per cent non-white and 40 per cent white was maintained.

Dispute Resolution in Institutions

Social mediation in institutions has grown substantially in the past ten years. Hospitals, mental institutions, schools, prisons, and other institutions have employed mediation to settle disputes. Formerly, such disputes often amounted to little more than a "fixed fight." The institution's power over the individuals under its control made the outcome almost inevitable. In recent years, however, the situation has changed. Many hospitals, for example, have codified the rights of patients under their care. Teachers, parents, and students have organized to counterbalance the power of the educational bureaucracy. As institutional power has become diffused, the response to conflict has increasingly involved mediation rather than institutional fiat. The result of this change in attitude can be seen in the one institution probably most resistant to change and redistribution of power—the penal system. The changing attitude in prisons has been credited to the civil rights movement, heightened ethnic and political awareness, more assertive representation of inmates, and the willingness of the courts to rule on inmate grievances.

One of the first penal systems to establish a formal grievance procedure was the California Youth Authority (CYA). (Despite its name, the Youth Authority is a penal institution populated by 4,000 prisoners who have been convicted of serious crimes. Although the average age of

Inmates and staff of the Kirkland Correctional Institution in South Carolina undergo training on grievance committee operations under the guidance of representatives of the Center for Community Justice, a Washington-based organization that has provided legal services for prisoners and helped implement grievance systems of several states.

the inmates is twenty, more than half of them have been committed to prison by adult criminal courts.)

"Youth institutions had experimented for ten years with student councils, ombudsmen, and advisory committees," CYA Administrator John Holland notes. "But none of them was very effective because there was really no power-sharing. When it came down to it, the administration did as it pleased."

CYA director Alan Breed had served as a member of the advisory board of the Center for Community Justice, in Washington, which had provided legal services to prisoners and attempted to establish grievance mechanisms for inmates in several states. In 1972, he formed a task force of top-level CYA administrators to help deal with growing violence and conflict in the institution subsequent to the 1971 Attica uprising. The task force devised a grievance system that included such guidelines as:

- Elected inmate representatives and prison staff would participate in designing procedures and resolving grievances.
- Inmates who used the grievance system would receive a guarantee against reprisals by prison staff or other inmates.
- Inmates could receive written responses at each level and could appeal to an independent review panel outside the Youth Authority.

The Center for Community Justice and the Institute for Mediation and Conflict Resolution were called in to work with CYA officials to implement the new system.

As developed in training and orientation sessions with a sample group of staff and inmates over six months, the system involved three stages. A grievance would be referred to a committee composed of line staff and inmates who would try to mediate the conflict. If they did not succeed, the complaint could be referred to administrators. If the inmate was dissatisfied with the administrators' response, the complaint could be submitted to an outside review panel composed of an inmate representative, a CYA representative and a professional arbitrator selected by the Community Dispute Services of the American Arbitration Association.

Implementation of the system encountered resistance, especially at the outset. As John Holland of CYA recalls, "The line staff was opposed to anything they thought challenged them and their power. But as they participated in the training and in the system itself, much of their resistance was overcome. The old officers and guards knew in their hearts that the system stunk. The therapists remain most resistant to a

grievance system. They think they have the inmates' interest at heart. If you see a kid as a patient it's hard to give him power. They rely heavily on therapy that emphasizes confrontation, not mediation or reconciliation."

Despite such resistance, by mid-1975 all of California's youth institutions had successfully adopted a similar grievance mechanism. Of 7,124 grievances filed through February, 1976, approximately 85 per cent were resolved. Fifty-six per cent of these complaints were resolved in favor of the complainant.

The CYA system differs from previous prison grievance procedures (and many other grievance mechanisms) in that inmates can bring grievances not only against staff actions but can also file to change the substance of prison policies.

For example, a 21-year-old inmate complained that the policy of prohibiting beards and long hair should not apply to youths accepted for parole. He argued that he should be free to decide his own personal appearance. Officials argued that the importance of first impressions the parolee might make upon release from prison did not justify relaxing what were already very minimal standards of appearance. Also, they argued, it would be more difficult to identify bearded inmates who attempted to escape.

The decision was appealed to the outside review panel, which ruled in favor of the inmate:

> Customs and attitudes relative to head and facial hair styles have changed rapidly...one sees long hair and beards in places of employment now that would have been unheard of a few years ago.... To deny the right to wear beards...because one or two in the group *might* attempt to escape appears to be inconsistent with the spirit...of the school's behavioral treatment program.

In many similar cases, the grievance mechanism system has provided a vehicle for changing institutional policy as well as for resolving specific disputes.

Although the CYA program has been basically successful and widely emulated, it does have some limitations. The institution's director may reverse a ruling by the review panel if, in his view, it violates the law, funds are not available to implement the decision, or if it threatens security in the prison. In practice, however, such reversal has rarely occurred. In addition, the program has not been effective in disputes between inmates. "Inmates will not file grievances against other

inmates," says CYA's John Holland, "because they are afraid of reprisal."

Still, similar grievance procedures have been adopted in New York State, South Carolina, and the California adult prison system. The Institute and the Center for Community Justice have participated in the training and implementation phases of these programs.

Court Diversion Programs

Court diversion programs seek to settle relatively minor disputes between individuals outside the criminal justice system. An important by-product of this process is that individuals are not branded as criminals. "Many people who get involved in criminal proceedings are not criminals," says Robert Coulson, president of the AAA, "Technically, throwing a rock through a window may be a crime. But the kid who does it is not necessarily a criminal. If you get him in a court and he cops a plea (or, as would happen on an odd chance, he gets tried and convicted), he's marked a criminal forever and you've probably lost him to the whole system. If you can get him into a private mediation system you can maintain his status as a non-criminal."

Criminal prosecution in minor cases is often sought by one of the parties as a tactic in a confrontation rather than as a solution to a problem. The alternative of sitting the parties down together and working out an agreement rather than going the route of arrest can remove a significant portion of the caseload from an already overburdened court system. Thus, other by-products of court diversion are greater efficiency of the justice system and its enhanced ability to retain public confidence. In Philadelphia, where CDS first experimented with court diversion in 1971, more than 500 of some 1,400 court cases arising from private criminal complaints, were of the "neighborhood squabble" and family quarrel variety. In its first year, the center resolved 20 per cent of the cases that would have normally gone to litigation. In its second year the number rose to 36 per cent.

Support for diversion programs is spreading. The court diversion process has been instituted in New York City, San Francisco, Cleveland, Akron, and Rochester, New York under the auspices of AAA and the Institute for Mediation and Conflict Resolution. The Philadelphia program is now administered directly by the municipal court system and funded by the city and county. In the state of New Jersey and in

Boston, publicly funded court diversion programs have been established.

"In such programs," says CDS Director Joseph Stulberg, "we operate on the assumption that both parties contributed to the ill will. The designation of a defendant and a plaintiff is often a cosmetic distinction. In a criminal trial you focus on the charge. In our procedure we are concerned with the broader human issues involved."

The architects of these programs believe that for their efforts to be successful it is necessary to train community residents as mediators and arbitrators. Local residents, they feel, are likely to be more familiar with the broader human issues involved in the dispute than outsiders and more likely able to avert conflicts. "Third parties, be they seasoned lawyers, law students, or others should not use their role as mediators or arbitrators to act as judges and prosecutors, to bully the parties into an agreement," says Stulberg, who himself administered a court diversion program in Rochester. "The agreement should be the disputants' own."

Thus, another dividend of court diversion programs is the training of hundreds of men and women who may be expected to practice their newly found skills in conflict resolution not only in court diversion cases but in a variety of disputes in schools, hospitals, workplaces, and other settings in their own communities.

The training program for community residents makes a distinction between mediation and arbitration. In mediation, the parties to a dispute agree to call upon a third-party neutral who will facilitate their discussion and assist them to reach agreement. The issues are resolved only if all disputants can live with the agreement. In arbitration, the parties agree in advance to submit issues to an arbitrator with the understanding that the arbitrator's decision will be final and binding.

The court diversion process has given birth to a hybrid system known as "med/arb." The dispute resolution effort begins with mediation, but if the neutral party believes the disputants are not going to agree, he or she may go ahead and render a decision, after warning the parties that the plan is to do so.

In practice, neutrals try to avoid taking the final step of arbitration. Manuel Orochena has intervened in more than 250 cases in the New York program conducted by the Institute for Mediation and Conflict Resolution. Only five times has he resorted to arbitration. "I've always had the feeling that no agreement is going to work unless the parties agree to it," he says. "If you impose a resolution, they'll act as if a judge

were making a decision. They go out and commit the same offense."

The mediator sometimes has to act as a counselor, says Don Elfe, former director of the New York program. "A mediator or arbitrator must understand that in a criminal case, a person will agree to almost anything to beat the court charges. A mediator has to protect the accused against himself. A man who steals something from a neighborhood store might agree to repay $100 a week, but the mediator has to say, 'Can you really afford that?' "

Mediators in court diversion cases must explain clearly to the disputants that if they fail to live up to the terms of the agreement they will face legal action. (If they do reach an agreement, their fingerprints, taken at the time charges were brought, are removed from police files.) The agreement is a written one and copies given to the disputants. "It's a real danger if you let them leave the office without an agreement," Elfe says. "Unless they have that piece of paper you don't know what's going to happen. I've seen a husband promise not to hit his wife anymore, then he walks outside the office and punches her in the mouth."

The institute's court diversion program began in two police precincts on Manhattan's West Side. It now receives cases from both the police and the summons division of the criminal court for all of the Bronx and all of Manhattan above 110th Street. It has also begun to mediate cases in Brooklyn. Of 3,543 cases referred to the institute since 1975, 3,132 cases, or 88.4 per cent, have been resolved.

Environmental Disputes

Arguments over the proposed construction of a flood control dam in the Snoqualmie-Snohomish River system, which begins some thirty miles east of Seattle and flows northward along the east side of the metropolitan area until it reaches Puget Sound, had been raging for fifteen years when a mediation team from the Community Crisis Intervention Center of Washington University in St. Louis* entered the dispute in 1974.

In 1959 floodwaters had poured down out of the mountains, surging through rich farmland. Supported by the local county government, the Army Corps of Engineers made a study that concluded that three flood-control dams should be built, two on the north fork tributaries and one on the middle fork. Lower valley farmers supported the proposal

*In 1975, the staff of the center moved to the University of Washington, Seattle, where it became the Office of Environmental Mediation.

because they believed it would end or at least minimize the periodic floods which swamped their farms. Many middle valley residents, particularly those who wanted to encourage residential and economic development in the area, also lined up behind the three-dam proposal. A coalition of opponents wanted to preserve the river in its natural state. They were determined to prevent unplanned commercial development of the Snoqualmie river valley, as had occurred in some Seattle suburbs.

The mediation team consisted of Dr. Gerald Cormick, director, and a colleague, Jane McCarthy. Successful mediation of a major environmental dispute such as the Snoqualmie dam controversy, they believed, could set a pattern nationally.

In the Snoqualmie dam dispute the team was fortunate in that certain developments external to the negotiations were moving the parties toward settlement. In May, 1973, before mediation began, Raymond Mosher, an engineer and member of the Washington Environmental Council, had proposed a solution that would couple construction of a dam with an area-wide land use plan. Mosher's plan recognized the need to reduce the current flood-damage problems significantly and also provided for promotion of solutions of alternatives as effective as concrete, stump-laden fluctuating holding ponds. The final settlement reached after mediation by Cormick and McCarthy would differ in important respects, but Mosher's proposal clearly indicated that not all environmentalists were irrevocably opposed to a dam.

There were also other factors at work that hastened progress toward a solution of the conflict. The opponents had been supported by Governor Evans, who had twice rejected the Corps of Engineers proposals to build the dams. But in 1974, there were intimations that Evans would not seek reelection, and the opponents were aware that a new state administration might not oppose the dam. The emotional factor also had to be considered. Opponents were concerned that another devastating flood might generate irresistible public sentiment for a dam. Also, they could not ignore the fact that houses were being built in the flood plain despite zoning regulations which prohibited construction. At the same time, proponents too had come to realize the dispute was a no-win situation, for a number of reasons including rising costs due to inflation.

In preliminary discussions with the disputants, Cormick and McCarthy sensed that they were privately considering some form of compromise. The problem was that publicly they could not retreat from their previous positions. The organizations they represented demanded

that they adhere to their all-out support for the dam or their all-out opposition to it.

Cormick and McCarthy first managed to narrow the number of individuals who had been publicly identified with the dispute to a dozen or so persons with such stature that the various groups--including farmers, environmentalists, and land developers—would support them and their decisions.

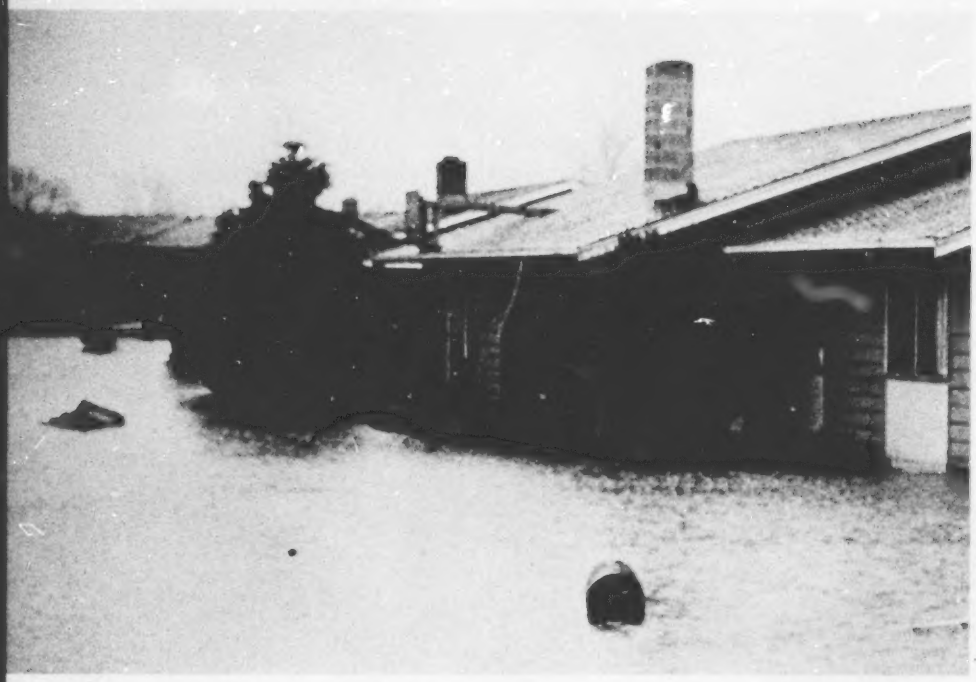
The mediators also acted as a liaison between the parties and those governmental entities responsible for implementing any agreement—the governor, the Corps of Engineers, and county officials. However, he insisted that the actual parties to the mediation efforts include only private citizens. He maintained that to engage government officials and private citizens in the mediation effort would mean an uneven mix of authority and responsibility; a single citizen simply does not have the decision making power of an official.

Cormick and McCarthy succeeded in shifting the emphasis from a debate over possible solutions to a consideration of the major issues. "Before mediation," Cormick notes, "The argument was all, 'a dam or no dam,' 'flood control or land preservation.' When we got to talking, we tried to deal with specific issues, with what would satisfy all the interests, what different measures would allow all the parties to live with each other." Although considerable good will was thus developed at the bargaining table, the parties believed it would be difficult to persuade the organizations they represented to support a compromise solution.

George Yount, a member of the board of the Washington Environmental Council, and Ed Delanty, an active member of the Washington Kayak Club, a group of sportsmen, began to lobby among groups opposed to the dam. "When we appeared before the club they tore us apart," Yount said. "They said, 'Who are these mediators? What are they trying to do—sell out the river?' The toughest part wasn't the mediation. It was selling the outside groups on the plan." Yount and Delanty succeeded in winning support of other influential groups, including the Washington Environmental Council, the League of Women Voters, and the Sierra Club.

The final agreement provided for the construction of a single multipurpose dam on the north fork of the Snoqualmie, the preservation in its natural state of the middle fork area, and continued use of the lower valley as an agricultural green belt. The key to the agreement was the recommendation for a total land-use plan for the basin of the

Snoqualmie Falls, part of a river system in the State of Washington that was the scene of a major environmental dispute mediated by a team from the University of Washington (see pages 21 to 26). Flooding of nearby homes (right) and farmland led to proposals for a controversial dam construction program.



Snoqualmie River, a major tributary to the Snohomish, that required the approval of two counties, a city, and fifteen towns.

After the agreement was signed, the governor appointed a twenty-member committee, with Delanty as chairman, to coordinate implementation of the agreement. In the ensuing three years the project has been caught in a crossfire of bureaucratic infighting, jurisdictional rivalries, and political hostilities. But the state has reaffirmed its support and sponsorship, the committee has won the support of the local counties for parts of the plan, and, Cormick reports, the Corps of Engineers has indicated its intention to "get on with it." No funds have been committed to the program. In hindsight, Delanty says, "we should have involved government officials more closely when we were negotiating. When we negotiated this conflict we never imagined we'd be spending the next two years trying to solicit fourteen municipalities and two county governments and the state and federal government. When you're trying to implement something that involved a couple of hundred million dollars, there are another couple of million people who want a say in it."

Scott Wallace, a former county commissioner who represented the farmers in the mediation, says, "We should have gotten some agreement, at least in principle, from all the funding sources before we ever signed this. In 1967 the estimated cost of the dam was $60 million, and by the time they get it built, if ever, it'll probably be $260 million."

The Snoqualmie settlement was one of the earliest ventures into environmental mediation, and Cormick still believes that involving both government officials and private citizens in a mediation effort makes it very difficult to reach an equitable agreement.

A related issue is the question of how open mediation efforts should be. How much of what goes on during negotiations should be made public, and when? Time-consuming public debate may be avoided by not publicizing the negotiating sessions. However, secrecy may subvert the right of the public to be involved in policymaking.

The issues of participation and openness in the mediation process arose again in another difficult dispute mediated by Cormick and another colleague Leah Patton. It involved the proposed widening of Interstate 90 just before it crosses Lake Washington from Seattle's east side suburbs. For sixteen years a coalition of community groups, environmentalists and mass transit proponents had fought the project. The three municipalities involved—Seattle, Bellevue, and Mercer Island—were bogged down in conflict. Construction had been blocked by the courts, which had ruled that the state's Environmental Impact Statement was inadequate.

The mediation was limited to public officials representing the three municipalities, the State Highway Commission, King County, where Seattle is situated, and Metro, the regional transportation planning organization. While citizen groups did not participate directly in the negotiations, public hearings and meetings were held to discuss the progress of the negotiations, and citizen groups, along with media representatives, attended all of the joint sessions.

The settlement reached after five months provided for three general-purpose lanes in each directions and one or two mass-transit lanes. It was widely heralded in the press and by public officials, particularly because the estimated cost of the expansion was rising at the rate of $100,000 a day and now stood at nearly $800 million. However, some community activists criticized the process, arguing that the decision should have been reached through the conventional political process.

A different approach to environmental disputes is being taken by

Professor Paul Wehr at the University of Colorado in Boulder. He is designing methods to build consensus among citizens who take different positions on environmental issues in their communities. "Mediation is only one form of environmental conflict management," he says. "Many environmental disputes cannot be settled at the mediation table. I want to see if we can get consensus on a controversial issue if citizens representing different interests and value preferences are provided with necessary information. They must have data about the most significant impacts the proposed project would have as well as a way to calculate what the personal quality of life changes from those impacts would be."

In Eagle County, Colorado, Wehr has formed a citizen's panel to study the merits of a proposal to build a ski area. "Citizens of the nearby communities are sharply and fairly evenly divided on the issue. Whatever the outcome, hostility and resistance to the decision will eat away at the county's future ability to plan for and manage growth." Through the citizen's panel sessions, efforts are made to share important information. The research team is also developing a form with which citizens can assess the probable gains and losses in the quality of life from the ski area.

Wehr has also applied the techniques of impact assessment and mapping of citizen values in a dispute in Wichita, Kansas. The city wants to expand its water supply for anticipated future growth. Two possible sources are an underground aquifer northwest of the city and a proposed reservoir to the south. Irrigation farmers oppose the first option, while environmentalists and farmers who would be flooded out oppose the second.

Wehr's research team, in cooperation with the U.S. Bureau of Reclamation and technical experts, had planned to study alternatives such as industrial water recycling and various conservation practices and the likely social impacts of each. They were also prepared to identify the preferences of each of the affected groups: irrigation and dryland farmers, urban industrial water users, environmental organizations and the like. By selecting the alternatives which best met the diverse value preferences and needs of these groups, the conflict could have been resolved, Wehr believes. However, the city and the Bureau of Reclamation decided on the reservoir before the research could be completed, and the conflict continues unabated. "Our premise," Wehr explains, "is that if we involve people in an environmental decision the chances of implementing the decision are going to be much greater."

In conclusion, it may be noted, computers may be coming into use in the mediation of environmental disputes, a development which may ease some of the burden of mediation. Donald Straus of the American Arbitration Association, drawing upon his experience in a two-year, Foundation-supported study of coastal zone management policies in New Jersey, says, "We must find ways to increase human capacity to consider an exponentially larger number of variables than are possible under traditional negotiating techniques, and at the same time retain the human quality of interpersonal interaction. We are just beginning to learn how to use the leverage of computers to help us in this task. The very rigidity of the machine itself requires individuals to be quite precise about their basic assumptions and the facts they use. This is particularly true if the ground rules of the process require that all parties to a multi-party negotiation agree to use the same computer data bank and cooperate in constructing the computer model. This provides an opportunity—in fact it makes it absolutely necessary—that consensus be sought at the very start of the process. Mediation can be used at this early stage to obtain early identification of disputes for the purpose of getting agreement on the basic facts and the issues which are to be discussed. We have called this 'data mediation.'

The computer also permits individuals to look at the problem in small, human-sized chunks and then to put the agreements reached with regard to these smaller chunks of the larger problem into the model without fear that, at a later date, when the entire problem is being negotiated, these smaller chunks of the model and the consensus reached concerning them will be ignored or forgotten."

Training

Men and women who are trained in conflict resolution programs supported by the Ford Foundation represent a cross-section of social and institutional interests. They range from a police lieutenant in New York to a prison guard in Ohio, from a law school student at Harvard University to a staff member at a school for the educationally handicapped in Boston, from a Junior League member in San Francisco to a public housing official in Akron to a member of the Washington State Environmental Council.

Tuition charged for training courses provides an important source of funds for mediation services. In addition, the skills developed in the

training programs are as useful in preventing disputes as in resolving them. "We don't know how many other people the graduates of our courses are teaching in their communities and institutions," says George Nicolau, who has conducted many of the institute's training programs. "But we do know that we have spread the idea of peaceful resolution in this society."

The training program Nicolau has conducted for the Justice Resource Institute's urban court program in Boston is fairly representative. Discussion centers at first on the general principles, techniques, and strategies of mediation and eventually turns to specific cases. Nicolau tells the participants that they must earn the trust of the disputing parties by carefully explaining the mediator's function and by listening attentively as the parties explain the dispute. He urges the trainees to remember that disputes are less important than the people involved. To paraphrase Nicolau, if the disputants can agree to live peacefully with each other without resolving "who" did "what" yesterday, then "who" did "what" yesterday becomes unimportant.

Most training programs emphasize that the mediator must not be predisposed toward one party or the other, must not reach a decision summarily, and that assessment of the conflict must not be tarnished by self-interest, institutional concerns, or ideology. Intuition plays a large part in resolving conflicts.

Training in mediation of social conflict is becoming more sophisticated and comprehensive. Recently the American Arbitration Association has begun to train mediators and arbitrators in marital disputes. In Rochester, a new CDS training program is directed toward settling disputes between the local welfare department and welfare recipients. In New York, the Institute for Mediation and Conflict Resolution has trained the entire precinct command force of the police department. The federal Community Relations Service has also asked the Institute to train a new group of conciliator/mediators.

The participation of such groups and institutions in mediation training reflects a shift in emphasis. "Some of the work CDS does has characteristics of an emergency service," Morris Stone, a retired AAA vice president, has observed. "Like a fire department it is called to action when a crisis occurs. But increasingly, its programs aim at preventive mediation, and the development of negotiating and peace-keeping skills to prevent outbreaks of disorder."

Through its training program, Stone says, CDS can "devise mecha-

nisms for ensuring that institutions—including universities, schools, housing authorities, health agencies, merchants, prisons—can deal with grievances by hitherto powerless groups of citizens for a share in decisions which affect their lives."

Prospects

In 1978, the Ford Foundation began a broader program in conflict resolution. Through support of planning, demonstration projects, research, and evaluation, the Foundation seeks to increase understanding of the larger issues in conflict resolution and of the links between problems in various segments of the adjudicative and regulatory processes. The aim is to help develop fairer and more efficient ways of handling the growing number of increasingly complex disputes in American social and economic affairs.

Foundation support will focus on three main objectives:*

1. **Strengthening the dispute-processing capacity of existing systems.** The social dynamics underlying the explosion of litigation are not well understood. More analysis of the adversary system is needed. Also lacking is a clear view of how the adversary system might be altered to reflect the changing nature of legal rights and entitlement. In addition, there is a need for analysis of the use by courts of ancillary bodies in complex cases, e.g., human rights committees, special masters in desegregation cases, and fact-finding bodies of expert mediators in complex environmental matters.

The possible wider applicability of individual experiments needs investigation—for example, experiments such as specialized courts dealing with housing and family matters; informal rule making by some federal agencies to simplify subsequent quasi-judicial decisions; the use of incentives and disclosure of information in place of regulatory standards, as in pollution control and occupational hazard cases; the use by some welfare departments of administrative rules to strike a balance between efficient management and protection of clients; and judicial review of discretionary action by administrative agencies in order to insure fairness.

Extensive research on conflict resolution is already under way abroad and the Foundation is now supporting collaborative research by the

*For a detailed discussion of the new program, see *New Approaches to Conflict Resolution* (Ford Foundation: 1978). Available from the Foundation's Office of Reports.

University of Southern California Law Center and the Center of Comparative Studies in Florence on dispute resolution experiments in twenty-three countries. The research deals extensively with such models as "social conciliation courts" in Poland, the public complaints board in Sweden, and the arbitration of small claims in Britain and Germany. Further support of the possible application in the United States of systems used in other countries may be granted.

2. **Finding better ways of handling disputes outside formal systems.** The use of mediation and other third-party techniques as a substitute for full adjudication of suits (one court's use of voluntary arbitration in handling claims up to $7,500, is one example) may have potential for wider application. Whether it is actually more cost-effective to arbitrate noncommercial cases than to take them to court needs to be determined.

Support is being discussed for the efforts of some mediation centers to deal with equal-opportunity disputes, medical malpractice suits, and landlord-tenant conflicts. Another avenue that may receive attention is the use of conciliation or community courts which are informal, have limited jurisdiction, are open to parties without charge, and use lay judges from the neighborhood. A reexamination of the use of ombudsmen may be undertaken to determine whether they can be effective against arbitrary use of power in schools, hospitals, nursing homes, and prisons.

Research on such private initiatives as Better Business Bureau arbitration programs for consumer complaints may be supported. Other interesting private efforts such as bargaining between interested groups (e.g., trade associations and consumer organizations) to set standards and establish informal systems for resolving disputes may also be supported. If private systems for handling disputes grow, it may also be necessary to support research into resulting changes in the role of courts, such as their monitoring responsibilities, standards for review, and the applicability of constitutional principles of procedure.

3. **Systematic reforms.** Any movement toward legal simplification as a means of avoiding disputes or resolving them more readily raises the issue of ensuring justice in individual cases. For example, proposals have been made to simplify divorce and adoption procedures and to substitute workmen's compensation principles for common-law tort rights in product liability cases. The question is whether equity and sensitivity to individual needs are possible under such generalized

procedures. Some answers may be suggested by analysis of experiences under no-fault automobile liability.

PUBLIC CONFIDENCE in the ability of existing machinery to avoid unnecessary conflicts, to handle fairly those that do arise, and to effectively hear legitimate grievances is declining. On that there is wide agreement. But there is considerably less agreement on what to do. In supporting wider inquiry and experimentation in mediation and conflict resolution, the Foundation's objective is to shed light on the alternatives before American society. In this way, it is hoped, any changes will be more likely to shore up confidence in the justice system and in the ability of public and private agencies and individuals to deal equitably and efficiently with differences that inevitably arise in a pluralistic and open system.